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IN THE

United States Court of Appeals

For the Second Circuit

Case No. 24920

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

SAMUEL GOLDSTEIN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF AND APPENDIX

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IN THE

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For the Second Circuit

Case No. 24920

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

SAMUEL GOLDSTEIN,

Defendant-Appellant.

APPELLANT'S BRIEF

Preliminary Statement

This is an appeal by the defendant Samuel Goldstein, an attorney, from the final judgment of the United States District Court, Southern District of New York (Ryan, J.) (App. 5a), in an action brought by the United States of America pursuant to 28 United States Code 1345 to enforce collection of unpaid withholding tax liens against a condemnation award in the sum of $4,350 made to the defendant taxpayer Pay-O-Matic Corp. by the New York State Supreme Court, New York County, for trade fixtures formerly owned by it. Judgment was rendered in conformance with a memorandum endorsed (App. 3a) on November 1, 1957 as the decision of the Court below on granting appellee's motion for summary judgment wherein it was adjudged that the appellee's lien for unpaid taxes is

superior to the lien and assignment of the condemnation award of appellant and denying the appellant's cross-motion for summary judgment.

Previously, a proceeding commenced in the State Court by motion on April 30, 1957 by the defendant Samuel Goldstein, and Sons, as attorneys for the defendant Pay-O-Matic Corp. in the condemnation proceeding, pursuant to Section 475 (App. 9a) of the New York State Judiciary Law to enforce their attorneys' lien against the award in the condemnation proceeding, was enjoined by order of the United States District Court, Southern District of New York (Levet, J.) made and entered on July 15, 1957.

Judgment was granted against Pay-O-Matic Corp. in the sum of $10,996.04. Appellant does not contest the liability of Pay-O-Matic Corp. for alleged tax delinquencies nor the validity of the appellee's liens.

This appeal is from the judgment, adjudging that the lien of the appellee for unpaid taxes is superior to the lien of and the assignment of the condemnation award to the attorney appellant.

The appellant was retained by Pay-O-Matic Corp. by written retainer agreement (App. 7a) as its attorney to represent it in the condemnation proceeding wherein it agreed to pay and "hereby assigns to said attorneys, for their services twenty-five (25%) percent of any award and interest that may be made for trade fixtures". Prior to the filing by appellee of its Notice of Tax Lien pursuant to 26 United States Code 6323, appellant was retained, as above shown, and had performed numerous and substantial services and incurred obligations for experts' fees and other disbursements in the condemnation proceeding which resulted in the award made to his client.

The judgment appealed from ordered the Comptroller of the City of New York to pay to appellee the entire condemnation award in disregard of appellant's lien.

Facts

The facts are not in dispute. Pay-O-Matic Corp. was delinquent in the payment of certain withholding taxes for 1954 and 1955 to the United States. On August 5, 1955 the City of New York vested title to certain of Pay-O-Matic's property in a condemnation proceeding, i.e., Washington Square Southeast Slum Clearance. On August 15, 1955 the Collector assessed Pay-O-Matic Corp. in the sum of $6,947.42. On November 15, 1955 a second and third assessment in the sum of $4,500.78 was made. On November 18, 1955 the appellant was retained as attorney in the condemnation proceeding and Pay-O-Matic Corp. provided therein (see App. 7a) that it "hereby retains Samuel Goldstein & Sons as its attorneys to represent it in the above proceeding, and agrees to pay and hereby assigns to said attorneys, for their services twenty-five (25%) per cent of any award and interest that may be made for trade fixtures contained in said property". An appraisal was ordered and made. This expert thereafter rendered his bill in the sum of $140, which is the fair and reasonable value of the services rendered. A photographer was engaged who took photographs of the property. Appellant performed all necessary services in representing his client in the condemnation proceeding. On December 12, 1955 the United States filed a notice of tax lien in the Register's office of New York County in the sum of $11,629.44. Thereafter Pay-O-Matic Corp. paid the sum of $9,856.12. In the schedule annexed to appellee's complaint it is shown that only $7,166.25 of this payment was applied to this lien. We contend in Point III of this brief that the full amount of this payment should have been applied against this lien. The unpaid portion of this lien would then be $1,773.32 and there would then remain a sufficient amount in the condemnation award to pay appellant's fee and disbursements in the sum of $1,294.32. On February 23, 1956 a fourth tax assessment of $3,254.77

was made against Pay-O-Matic Corp. Thereafter, in the condemnation proceeding, on March 30, 1956, as a result of a conference between appellant and the condemnor's attorney it was agreed to settle the claim of Pay-O-Matic Corp. for the sum of $4,350 and on April 17, 1956 a stipulation of such settlement was signed by Pay-O-Matic Corp. On June 28, 1956 an amended notice of tax lien was filed in the Register's office of New York County. On August 22, 1956 the decision of the New York State Supreme Court was published which incorporated the aforesaid stipulated settlement of the amount of the award and on September 25, 1956 that court signed the final decree.

The Court Below

The Court below held that the attorney's lien of appellant was subordinate to appellee's lien because appellant's lien was inchoate as compared to the Government's lien. The appellant as an assignee of the award under his written retainer agreement is a "purchaser" under 26 U. S. C. 6323 (discussed in Point I of this brief). The Court below based its decision on the application of the "Specific and Perfected Rule", to the case of a "purchaser".

It is contended (in Point II of this brief) that the Court below erred in the application of this rule to the case of a purchaser. For purposes of orderly presentation we cover this as the second point in this brief.

Issues

1. The attorney-appellant is a "Purchaser" within the meaning and intent of 26 United States Code 6323 and was such prior to the filing of the first notice of tax lien on December 12, 1955 by the United States Government. "Purchaser" under 26 U. S. C. 6323 is the same as "Pur-

chaser'' under numerous other statutes, mostly recording acts, where it is the term of art for the equitable doctrine of ''bona-fide purchaser for a valuable consideration''. The ''valuable consideration'' required is any consideration sufficient to support a simple contract as long as it is within the class that the law esteems as an equivalent given for the grant. And there is an equivalent given for the grant where the purchaser enters into a binding obligation under the contract from which he cannot withdraw or otherwise innocently changes his position and cannot extricate himself. Being a ''Purchaser'', the appellant's interest and lien is prior and superior to the respondent's lien.

2. The ''Specific and Perfected Rule'' does not apply to ''Purchasers''. To apply it would judicially repeal 26 U. S. C. § 6323.

3. The United States Government improperly applied the payments of the taxpayer client to the prejudice of the attorney-appellant. Correctly applied, appellant could satisfy his lien out of the condemnation award.

4. The appellee, in receiving the advantage of appellant's services has been unjustly enriched.

POINT I

The attorney-appellant is a "purchaser" within the meaning and intent of 26 United States Code 6323 and was such prior to the filing of the first notice of tax lien on December 12, 1955, by the United States Government. "Purchaser" under 26 U. S. C. 6323 is the same as "purchaser" under numerous other statutes, mostly recording acts, where it is the term of art for the equitable doctrine of "bona-fide purchaser for a valuable consideration". The "valuable consideration" required is any consideration sufficient to support a simple contract as long as it is within the class that the law esteems as an equivalent given for the grant. And there is an equivalent given for the grant where the purchaser enters into a binding obligation under the contract from which he cannot withdraw or otherwise innocently changes his position and cannot extricate himself. Being a "purchaser", the appellant's interest and lien is prior and superior to the respondent's lien.

The appellant-attorney and the appellee have two points of contention in regard to the construction of Section 6321 and Section 6323 of 26 United States Code under which the United States claims its priority of lien.** Briefly outlined these two sections provide that the date of assessment of federal taxes (here August 15, 1955 and November 15, 1955) shall be the date on which the lien for federal taxes affixes as to all those who are not "mortgagees, pledgees, purchasers or judgment creditors" before the filing in the Register's office of New York County of the Federal Notice of Tax lien.* (See also Article 10A of New York State Lien Law.) But, in the event that one is a "mortgagee, pledgee, purchaser or judgment creditor",

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* At no time until the notice is filed in the Recorder's office is it practically or legally possible for any third party to discover its existence.

** Reprinted in full, page 9a.

then the Government's tax lien affixes on the date that the notice is filed in the Register's office (here December 12, 1955). The appellant maintains that he is a "purchaser", and became so on the date he was retained, to wit: November 18, 1955, which was prior to the time the Government's lien was filed (December 12, 1955). The United States and the appellant both agree that the decisions all hold that to be a purchaser within the meaning of Section 6323 one must be 1. an innocent purchaser 2. have received title 3. and for value. Thus, we appear to agree that there was an assignment of award given the attorney in the written retainer agreement (App. 7a) dated November 18, 1955 which was given in good faith. The parties disagree as to the third requirement, *i.e.* value, and the United States adds a fourth requirement, that the "purchasers" interest must be specific and perfected.

Thus the United States has maintained that the consideration must be in money or in kind given simultaneously with the receipt of the assignment of the award to the attorney. We maintain, and the law clearly is, that any "consideration sufficient to support a simple contract" as long as it is within the class that "the law esteems as an equivalent given for the grant" is a valuable consideration. Secondly, the United States maintains that the failure of appellants assigned interest in and lien upon the condemnation award, to have a fixed dollar value deprives it of that definiteness of amount which the "specific and perfected rule" requires. Appellant maintains that the "specific and perfected rule" does not apply to "purchasers" and indeed, cannot, as interests in property that purchasers buy, do not have constant dollar values, but fluctuate with the market.

Construction of Section 6323

There have not been too many cases reported defining "purchaser" under Section 6323. Judge Jackson of the United States Supreme Court reviewed the history of Section 6323 in his concurring opinion in *U. S. v. Security Trust Company, etc.*, 340 U. S. 47, 52 (a case which did not involve the construction of the term purchaser). He stated that Congress amended and inserted into the present law the term "purchaser" in 1912 because of the decision in *U. S. v. Snyder* (1892) 149 U. S. 210 which he says (at p. 52)

> "held * * * that the lien created by that statute was a valid binding lien even against a bona fide purchaser for value without knowledge or notice of the existence of such a lien".

He refers us to the report of Congress that accompanied the amendment HR Rep. 1018 62nd Congress 2nd session to (1912).

The report he states noted critically that a "secret lien" of the government could upset the interests of an unknowing transferee in good faith and for value, and cover property all over the country where one would not discover the lien's existence.

This being so, Congress, from the act read as a whole, set up a recording act all of its own, modeling it after existing recording acts and borrowing their devices. Compare for instance the definition of the term "purchaser" under the New York Recording Statute for Real Property. Real Property Law, Section 290, Paragraph 2.

> "The term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration * * *".

There have been twelve decisions in the United States Supreme Court construing 26 U. S. C. 6323. (*U. S. v. Scovil*, 348 U. S. 218; *U. S. v. Acri*, 348 U. S. 211; *U. S. v. Liverpool*

& London Ins. Co., 348 U. S. 215; *U. S.* v. *City of New Britain*, 347 U. S. 81; *U. S.* v. *White Beer Brewing Co.*, 350 U. S. 1010; and *U. S.* v. *Collata*, 350 U. S. 808) and others discussed in the *Mason City* cases, page 16, *infra*. In each one of these, only one of the four types of lienors entitled to a priority have been considered. That has been the "judgment creditor". The "mortgagee", "pledgee" and "purchaser" have remained undefined by that Court except for dicta in the *Scovil* case.

> "A purchaser within the mean of Section 3672 [now Section 6323] usually means one who acquires title for a valuable consideration in the manner of vendor and vendee."

No Supreme Court decisions have further defined "purchaser".

As was stated in *R. F. Ball Construction Company* v. *Jacobs*, 140 Fed. Supp. 60 aff'd 239 Fed. 2d 384—appeal now pending in the Supreme Court in reviewing the term "purchaser" (p. 63):

> "Most of the decisions of the Supreme Court cited above and referred to by the government dealt with inchoate judgment liens and none of these cases dealt with the contract lien of a 'mortgagee', 'pledgee' or 'purchaser' • • • "

In *Marteney* v. *United States*, 245 Fed. 2d 135 the 10th Circuit Court discussed herein below, the Court cited their own language in an otherwise irrelevant decision (*Nephi Processing Plant, Inc.* v. *Western Cooperative Hatcheries*, 242 Fed. 2d 567, 570) to clarify the term purchasers as follows (p. 138):

> "The sale of personal property in the usual sense ordinarily means the passing of title and possession for money or other consideration which the buyer pays or promises to pay."

This formulation makes the following obvious.

1. "For money or other valuable consideration".

(a). That things other than money are capable of being consideration.

(b). The use of the term valuable consideration is a term of art having a fixed meaning in the law, as will soon follow.

2. "Which the buyer pays or promises to pay".

That all types of contracts of purchase, unilateral as well as bilateral, are covered. That is, the consideration necessary can be a promise as well as an act. That while still executory the promise is valuable consideration.

3. No requirement of choateness is included as necessary.

But aside from federal court clarification, state courts have long dealt with the "ordinary word purchaser".

In the classic case of *Ten Eyck v. Witbeck*, 135 N. Y. 40 Judge Maynard speaking for the New York State Court of Appeals discussed the word "purchaser" as used in the Real Property Recording Act of New York (p. 44).

> "While every legal mode of acquisition of real property, except by descent, is denominated in law a purchase, and the person who thus acquires it a purchaser, it is evident that the word is used in this statute in a much more limited sense. It is there applied only to such grants of real estate as are obtained for money, or some other valuable consideration. It denotes a buyer of property and has reference to one of the actors in a transaction of bargain and sale, which is presumably controlled by commercial considerations".

The Court states that the doctrine is used to differentiate these transactions from gifts, and goes on (p. 48):

> "'The phrase a "purchaser in good faith and for a valuable consideration" is not peculiar to the

> Recording Act but is one of frequent occurrence in the statutes, and is 'an expression which has been borrowed from the language of courts of equity and should be interpreted in the sense in which it is there understood * * *. A valuable consideration has been defined by writers upon equity jurisprudence as something which the law esteems as an equivalent given for the grant, and it is, therefore, founded on motives of justice.' "

It is clear that both the United States Congress in inserting Section 6323 into the Internal Revenue Law and the legislatures of the various states, including the State of New York, as Judge Maynard has said, *supra*, in adopting recording acts and other similar laws had reference to and borrowed the concept that grew out of equity. It is academic that the outgrowth of the equitable doctrine of purchaser for value grew out of the rule at law that a sealed instrument "imported" a consideration and a gift was thus possible of enforcement. Equity however, would not aid the promisee of a voluntary covenant, but left him to his legal remedy. See Williston on Contracts, Section 217. Equity has always been versatile and does not stick to pat formulae or hard and fast rules except in the most general way. The entire policy of the bona fide purchaser was to protect a person who innocently "got in a spot". If he was in a position where he gave nothing, or such an insufficient amount as to make his "good faith" suspect or he could legally retrieve himself from his "spot" by nonperformance of his obligation, equity would not aid him. In the last event the test would be whether the bona fide purchaser had a right of rescission for anticipatory breach of contract or not. *VanEyck* v. *Wilbeck*, *supra*, at page 49.

Varying statutes have attempted to codify this concept of "purchaser for value". The Uniform Negotiable Instruments Law, Section 25 (New York N. I. L. Section 51), entitled Valuable Consideration says:

> "Value is any consideration sufficient to support a simple contract * * * *"

and Section 191 says "Value means Valuable Consideration" (New York N. I. L. Section 2).

There is no weighing of the relative worth of the two considerations if bargained for. The question is solely whether the consideration is so disproportionate as to put a subsequent purchaser on guard. The value goes solely to the question of good faith. See *Riley* v. *Robinson*, 128 A. D. 178, 112 N. Y. Supp. 753, aff'd 202 N. Y. 53.

In *National Refining Company* v. *United States*, 160 Fed. 2d 951 the Missouri Circuit Court of Appeals held that the consideration for an assignment of a condemnation award to the plaintiff was the possibility of future extension of credit. In *Marteney* v. *United States*, 245 Fed. 2d 135 *supra*, the following occurred. An attorney represented a client in a series of matters and was due certain monies for which the client gave the attorney a note. Then the government assessed federal taxes against the client. Later the client retained this attorney in a later libel action on a 50% contingent fee. The client agreed with the attorney that the balance of the note given to the attorney (in payment for his fees for the previous action) should be endorsed by the attorney with the provision that the sum was to be collected out of the judgment in the libel action. The Federal Government then filed a notice of tax lien. The attorney pursued the libel action and received a judgment for $7,500. The issue was whether there was a valuable consideration for the first 50% of the judgment in the libel action representing fees in that matter. The Court held in that case that the restriction of collection of attorney's fees to the libel judgment (though certainly not the bargained for consideration), was such consideration as is considered "valuable consideration", such as to make the attorney a "bona fide purchaser for value", or a "purchaser" within the meaning of Section 6323.

In the case of *LaFar v. Grimes*, 86 Fed. 2d 809, the Court attempted to lay down a tighter rule than is usually found in the equitable doctrine, but which easily applies in this case. The Court said at page 812:

> "The principle upon which the doctrine of innocent purchaser for value rests like equitable principles in general, is not a hard and fast rule of narrow application, but one to be liberally and equitably applied. Under it relief is denied to a purchaser without notice who has not paid value, on the ground that his equity arises not out of his mere lack of notice, but out of injury to him, through an innocent change of position to his prejudice. It is therefore denied where the matter of the payment remains executory between purchaser and seller and there is no irrevocable change of position. It is granted where either the buyer has paid the purchase price or has entered with third persons into a binding obligation with regard to it, whether the obligation arises out of the execution of the assumption of negotiable promissory notes, or other form of undertaking, which the buyer is able to perform and from which he cannot in law withdraw."

While we maintain that the rule today is that an executory promise is "valuable consideration", some courts have held as above that in execution of the promise there would have to be a change of position such as the entry with third persons into binding obligations, etc. to constitute "valuable consideration". Our change of position was the extent of our performance of legal services prior to December 12, 1955, and we had entered into a binding obligation with Mr. Arthur Schaff to make an appraisal and Mr. Rutter to make the photographs.

Further, we were bound, * * * An attorney who undertakes the conduct of an action impliedly stipulates to carry it out to its determination, and he is not at liberty to abandon it without reasonable cause and reasonable notice. *Carter v. Carter*, 1946, 188 Misc. 156, 66 N. Y. Sup. 2d 768.

We have found no cases where it was held that an attorney could withdraw from a case because his client was delinquent in his income taxes, or because notice of such fact was filed in the Register's office or similar reasons. The attorney in this case was bound to continue his services. He bound himself at the outset of the proceeding which was prior to the filing of the Government's tax lien. Not only did he bind himself but he extended credit to the client by retaining the services of an expert and of hiring a photographer and then performed services prior to the time when he is deemed to have received constructive notice of the Government's tax lien under Section 6323. Thus, in the following cases the attorney was permitted to collect his fee. *Filipowicz* v. *Rothensies*, 43 Fed. Supp. 619; *Herlihy* v. *Phoenix Assurance Company, Ltd., et al.*, 274 App. Div. 342, 83 N. Y. Supp. 2d 707; *Lavenburg* v. *Universal Sportswear*, 198 Misc. 318, 98 N. Y. Supp. 2d 160; *Matter of Meltzer* (*Carlin Homes, Inc.*), Volume 138, No. 34, N. Y. Law Journal, page 4, Nassau County Supreme Court. See dicta affirming *Herlihy* case, *Morgan* v. *United States*, 131 Fed. Supp. 783.

In re Astoria Blvd., 171 Misc. 1018, 13 N. Y. Supp. 2d 433, was a New York State Supreme Court case in which the Court, as a clear matter of dicta, stated that an attorney is not a "purchaser" within the meaning of Section 6323. No reasons were given, nor any authority cited. But the Court did find, and thus award the attorney his fee by holding that an assignee is a "purchaser". It is well to point out that "the Herlihy case" mentioned above states at page 711 that all attorney's liens work "an equitable assignment of the funds produced by his efforts".

The United States insists on assimilating the term "purchaser" in Section 6323 to the term "sale" as used in the Sales Act (N. Y. Pers. Prop. Law § 82). It has cited cases under that Act where a contract for labor and services were differentiated from a "sale".

It is as true that the Sales Act in the Personal Property Law of New York does not govern sales of real property as it is that it doesn't govern contracts for labor and services. So a contract for the services and labor that go into the manufacture of an article is not a contract for the sale of the article. But—it would be absurd to suggest that even under the Sales Act that when an item is purchased it cannot be paid for by the performance of services and labor. *Smith* v. *Brandenburg Instrument Co., Inc.*, 50 N. Y. Supp. 2d 264. It has been held that a sale means the transfer of any property for any valuable consideration sufficient to support a contract. *Garfield Real Estate Co.* v. *Dennis*, 167 N. Y. Supp. 43. The traditional division of the field of law called "Sales" deals with juridical acts that have separate legal machinery for dealing with them than has the law dealing with contracts for labor and services. Such a distinction is irrelevant for our purposes.

The United States has also maintained that because Sections 474 and 475 of the New York State Judiciary Law give the client a right to discharge an attorney at any time and without cause, leaving the attorney only to his remedy in *quantum meruit* that the consideration which the attorney gives to the client is not adequate within the meaning of the term "bona fide purchaser for value" or "purchaser" under Section 6323. This, however, is not a condition precedent to the attorney's assignment, but a condition subsequent, at best. When the United States Supreme Court dealt with the term Judgment Creditor (also in Section 6323) it defined the degree of perfection of a lien that would be necessary to come within that section and it referred only to conditions precedent. It could hardly be maintained that all conditions subsequent be removed from consideration as then only would money in the promisor's pocket bar such happening.

It should be here addended that the outlays made by the attorney, the disbursements, are covered by the attorney's lien. See *Spence* v. *Bode*, 108 N. Y. Supp. 593; and *Hampton, et al.* v. *Rosenheim*, 155 N. Y. Supp. 361 at page 362.

POINT II

The "specific and perfected rule" does not apply to "purchasers". To apply it would judicially repeal § 6323.

In *United States* v. *City of New Britain, Conn.*, 74 S. Ct. 368, 347 U. S. 81, the City of New Britain claimed to be a judgment creditor for unpaid city taxes. The Court holding that the city's lien had to be perfected and specific, laid down the following criterion for each (p. 84):

PERFECTED—

> "The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien and the amount of the lien are established."

SPECIFIC—meaning that the lien has attached to a specific piece of property.

In *R. F. Ball Construction Company* v. *Jacobs*, 140 F. Supp. 60, aff'd 239 Fed. 2d 384, certiorari granted in the United States Supreme Court, the District Court disregarded the 12 cases decided by the Supreme Court of the United States because they all construed only the term "judgment creditor" in 26 U. S. C. 6323. It put the remaining "mortgagee", "pledgee" and "purchaser" in a different category, holding they did not have to be specific nor perfected. It called these "contract liens" and the former "statutory liens".

This distinction was fully discussed and adhered to in *Mason City and Clear Lake R. Co.* v. *Imperial Seed Co.*, 152 F. Supp. 145; 155.

> "Intimations have been made and the fear has been expressed that the United States Supreme Court might apply the 'specific and perfected' rule

> now being applied to statutory liens to consensual or contractual liens such as mortgages * * * [and at page 156]. To hold that Government claims for taxes could attain priority under the 'specific and perfected rule' over a valid real estate mortgage even though the tax debt arose subsequent in time to the creation of the mortgage would seem to have catastrophic consequences for fiduciaries, banks, pension funds and other investors investing funds in first mortgage loans."

SPECIFIC—If it were held that the award here was inspecific at any time, the Government's lien attached to the same inspecific property and thus suffered the same defect. However, the award was specific from the outset.

There is no contingency in condemnation. Property described by the taker is divested from its former owner and just compensation must be paid with or without any action by the former owner. Under the procedure used in the instant case a Judge of the State Court divested Pay-O-Matic of its title by an order issued in an *in-rem* proceeding, and having the duty to award just compensation set the matter down for a hearing, after payment of just compensation was absolutely assured (8/5/55). Former owners not appearing, the Judge was bound to award just compensation and hold an inquest for that purpose. At any rate, Federal law (14th Amend.) conceives and indeed requires the award to have been specific from the vesting date (8/5/55). So specific as to require interest to be paid on it from that date.

> *Kennedy* v. *Indianapolis*, 103 U. S. 599, 26 L. Ed. 550;
>
> *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, at 659, 341 L. Ed. 295, 10 Sup. Ct. 965.

PERFECTED—On November 18, 1955 Samuel Goldstein & Sons were retained and pursuant to their retainer agreement were assigned twenty-five per cent of the award owned to Pay-O-Matic Corp. They were given a one-quarter interest in the award or a tenancy in common in the award (see p. 7a, *infra*).

There was an effective transference of interest in the award, complete against all.

The United States maintains that not until the Final Decree in the condemnation proceeding was signed was the defendant attorney's services complete and thus "perfected". It applies the rule applicable to "judgment creditors" to "purchasers". A "judgment" is defined as:

> "The final determination of a court of competent jurisdiction of the rights of a party in an action or proceeding" (Black's Law Dictionary, 3d Ed.).

While a "judgment" must by its nature liquidate the damages to be "final" and thus be a "judgment" be perfected, and choate, this does not follow for a "purchase". A "Purchase" cannot by its nature be liquid as to its value. A "purchaser denotes a buyer of property" (see *Ten Eyck* v. *Witbeck*, 135 N. Y. 40) and the transfer of an interest in property. While there is a consideration given for the transfer, that does not necessarily establish or fix the value of the purchaser's interest. Value is established by "market", and "market" fluctuates, is never constant and is subjective. Thus "purchaser" would not have a fixed dollar translation for his interest.

As was suggested in the *R. F. Ball* and *Mason City* cases, to add such a requirement as the specific and perfected rule to the "purchaser" category would be to judicially repeal Section 6323.

POINT III

The United States Government improperly applied the payments of the taxpayer client to the prejudice of the attorney-defendant. Correctly applied appellant could satisfy his lien out of the condemnation award.

The information supplied by the Government in the chart accompanying the complaint and the notices of tax lien filed in the Register's office indicates that the Government in receiving monies after the assessment was made by the collector and after a demand for payment and after such threat of legal action received certain monies from said taxpayer. Instead of applying these monies in the order in which the delinquencies were due, the United States left an unpaid amount of the monies demanded under the first lien roughly equivalent to the size of the award in the condemnation proceeding and applied the remainder to later and junior liens under which they would have no priority over the appellant's lien. Section 6323 of 26 U. S. Code and other statutes, gives to the Government, as we have seen, certain extraordinary powers and privileges in relation to other liens and in enforcement of its liens. As a matter of common sense, equity and justice the United States should be bound to deal fairly with other lienors. It is not in the position of an ordinary creditor. It is bestowed with certain rights that only Courts of law can exercise with other creditors. Thus in the case of *Commercial Credit Corporation* v. *Schwartz*, 130 Fed. Supp. 524 where a similar situation arose and the Government applied sums received at a distress sale to later and junior liens to the prejudice of lienors with superior liens, the Court said (p. 530):

> "The effect of giving recognition in the instant proceeding to the allocation made by the government of the proceeds of the sale of the personal property

would be to permit the government to satisfy out of such proceeds two junior liens while preserving its senior lien for enforcement against the fund which stands in the place of the real estate and with respect to which the right of the plaintiffs are inferior. The injustice of such a result is manifest to our eyes."

This issue becomes important because the services of the appellant was completed on March 30, 1956, when the amount of the claim was adjusted with the City of New York. See *In re City of New York (Mill Brook Houses)* 146 N. Y. S. 2d 520, 1 App. Div. 667 aff'd w o opinion Court of Appeals 161 N. Y. S. 2d 130. It was not until June 28, 1956, that the second notice of lien was filed by the Federal Government in the Register's office. If payment were applied as we maintain it should be, the Government's first lien is small enough to allow payment of both the attorney's and the Government's liens out of the condemnation award.

POINT IV

The appellee in receiving the advantage of the defendant-attorney's services has been unjustly enriched.

There are a few cases where the facts are on all fours with the facts in this matter. Among these are the *Herlihy* case *supra*, the *Lavenburg* case *supra*, the *Filipowicz* case *supra*, the *Meltzer* case *supra* and some others. These cases do not directly discuss the provisions of the Internal Revenue Code, namely Section 6321 and Section 6323. The Courts in each of these cases in holding that the attorney's lien was superior to the federal lien appeared to be relying on general quasi contractural theories or on some estoppel basis.

In the case of *Filipowicz* v. *Rothensies*, 43 Fed. Supp. 619, the Court at page 624 said:

> "I base my ruling that the attorney's fee should be paid out of the fund involved in this proceeding upon the well recognized principle that an attorney has a lien on a fund which has been created as a result of his efforts in litigation."

then citing *Harris' Appeal* (*Jacoby's Appeal*) 323 Pa. 124, 125, 186 A. 92, he quoted:

> "If a principle in law or equity can be found to sustain an award, of reasonable counsel fee and costs to the owner's attorney who litigated the compensation dispute and whose services helped produce the fund it ought to be applied."

The facts of that case are these. There was a bankruptcy. United was a creditor of the bankrupt. Then an assessment was made by the United States against United. United retained an attorney and the attorney went ahead and filed a claim in the bankruptcy. The Government then filed its tax lien in the proper place for recording. It was a good time later before the attorney was able to produce a fund. The Court there held that the attorney was entitled to be paid his fees and made the foregoing statement in that connection. In the *Herlihy* case the New York State Appellate Division 3rd Department based its giving of a priority to the attorney's lien because the attorney produced the fund. This case has been widely cited approvingly.

In an article written by Leonard Sarno, a Special Assistant to the Attorney General in the tax court, entitled "Correlation of Priority and Lien Rights" appearing in 95 University of Pennsylvania Law Review, page 761 (which was cited by Justice Minton of the United States Supreme Court in the *United States* v. *The City of New Britain*, *supra*), stated:

> "The problem of attorney's fees and interest is somewhat different. * * * Since the United States if it foreclosed would have to pay the expenses of foreclosure and give the principal to the mortgagee, it

seems only right to allow such expenses to take precedence when paid for by the mortgagee. This is somewhat similar to the collector selling goods and paying the costs of the sale before collecting the tax."

The idea behind these cases as stated from a practical viewpoint by Mr. Sarno is this. If the United States had foreclosed its tax lien, at the outset of the condemnation proceeding, and then asserted its interest in the condemnation proceeding, the Government would have had to pay for attorney's services. Why, therefore, should they object now, after having received the benefit of the attorney's services. The United States received a benefit and would be liable in quasi contract.*

* There have been several thorough law-review articles published recently which review the entire construction of the statute and the practical consequences to purchasers of property and their attorneys. See 29 Rocky Mountain Law Review 167 (Feb. 1957) and 63 Yale Law Journal 905 (May 1954).

CONCLUSION

The appellant is a "purchaser" under 26 U. S. C. 6323 by virtue of the prior assignment of award to him and his attorney's lien, and having created the fund, he is entitled to priority in satisfaction of it over the appellee's lien. The decision of the Court below should be reversed and judgment granted the appellant directing the Comptroller of the City of New York to pay to the appellant its assigned portion of the condemnation award to Pay-O-Matic Corp., in satisfaction of its lien, in the sum of $1,294.32.

Respectfully submitted,

SAMUEL GOLDSTEIN & SONS,
Attorneys for Samuel Goldstein.

ARTHUR D. GOLDSTEIN,
Of Counsel.

APPENDIX

For the Second Circuit

Civ. 121-172

—o—

UNITED STATES OF AMERICA,

vs.

PAY-O-MATIC CORP., SAMUEL GOLDSTEIN, THE CITY OF NEW YORK, and R. L. POLK & CO., INC.

—o—

Docket Entries

Date	Proceedings
1957	
June 6	Filed complaint and issued summons.
June 11	Filed affdvt & show cause order—Enjoin City NY from paying out, etc.—ret. 6-13-57. (Payment stayed pending determination).
June 11	Filed affdvt & show cause order—Dismiss, etc.—ret. 6-13-57.
June 12	Filed summons & return—served defts Goldstein, City of NY & R. L. Polk & Co. 6-10-57.
July 1	Filed memorandum opinion #23627. Defts. Goldsteins motion to strike pps. 3 and 4 etc.—denied. Pltffs. motion for temp. injunction granted. Settle order on notice. Levet, J.
July 1	Filed affdvt. of Rose Lyman.
July 16	Filed order granting pltf. motion, denying defts. cross motion and enjoining City of N. Y. and defts. etc. see order. Levet, J. Mailed notice of entry, 7-17-57.

Docket Entries

Date	Proceedings
1957	
July 18	Filed additional summons and return, served Max Wittenberg, of Pay-O-Matic Corp, 7-15-57. EDNY.
July 26	Filed answer and cross claim of deft. Samuel Goldstein.
Sept. 16	Filed Reply of pltff.
Sept. 18	Filed Affdvt & Notice of motion for summary judgment. Ret. 10-8-57.
Oct. 2	Filed affdvt. & Notice of Cross-Motion for Summary Judgment. Ret. 10-10-57.
Nov. 1	Memo End. on Cross-Motion filed 10-2-57: Motion denied. See endorsement on Government's companion motion, Ryan, J. Mailed notice of entry 11-4-57.
Nov. 1	Memo End. on pltff's motion filed 9-18-57: Granted (see memo). Submit judgment accordingly as indicated. Ryan, J.
Nov. 15	Filed Summary judgment #61,876 in favor of Pltff in the sum of $10,996.04. Ryan, J. Mailed notice of entry 11-18-57.
Nov. 29	Filed Notice of Appeal—Mailed copies to Pay-O-Matic Corp. R. L. Polk & Co. Inc., City of New York (Peter Campbell Brown) and Samuel Goldstein 1-29-57 & US Atty.
Dec. 3	Filed notice of certification of record to USCA.

Opinion of Ryan, J.

(Record, page 48)

Plaintiff United States of America and defendant Samuel Goldstein have moved respectively for summary judgment under Rule 56.

Suit was filed to enforce collection of unpaid Government withholding tax liens against a fund of $4350, held by the Comptroller of the City of New York arising from a condemnation award for trade fixtures formerly owned by the defaulting taxpayer Pay O-Matic Corp. All the defendants have failed to appear or answer, save defendant Goldstein, an attorney who alleges a lien and claim to $1294.32 of the fund for professional services rendered by him in securing the condemnation award.

It is undisputed that there is no genuine factual issue. The question presented is whether the Government lien is prior and superior to the lien of the defendant Goldstein. We hold that it is.

Chronologically we find the following facts not in dispute—

1. On August 5, 1955 The City of New York became vested with title to certain trade fixtures of Pay O-Matic Corp. as part of a condemnation proceeding the City had commenced to which the Government was not a party.

2. On November 18, 1955, Goldstein was retained by written retainer to represent Pay-O-Matic Corp. in the condemnation suit and the retainer provided that it "agrees to pay and hereby assigns to said attorney twenty-five (25%) percent of any award and interest that may be made for trade fixtures contained in said property." A notice of lien for professional services was filed by Goldstein with the Comptroller of the City of New York on November 22, 1955.

3. On December 6, 1955 a notice of levy covering withholding taxes amounting to $16,046.17 for the last quarter of 1954, and the first, second and third quarters of 1955 was served upon Pay-O-Matic.

4. On December 12, 1955 a notice of Federal Tax Lien was filed in the Register's Office of New York County for $11,629.44 covering the last quarter of 1954 and the first and second quarters of 1955.

5. On April 5, 1956 a Notice of Levy was filed with the Comptroller of the City of New York for $5,262.64 due for withholding taxes for all of 1955 from Pay-O-Matic to attach to any funds due Pay-O-Matic for the property taken by the City.

6. On June 27, 1956 an amended notice of Federal Tax lien was filed in the Register's Office and with the Comptroller for $11,882.43 for withholding taxes for all of 1955 and for unemployment taxes due for 1955 from taxpayer.

7. On August 22, 1956 a final decree was entered in the Supreme Court of the State of New York, County of New York in the condemnation proceeding awarding Pay-O-Matic a total of $4,569.28 as compensation for the property taken by the City.

8. Samuel Goldstein, the defendant, appeared for Pay-O-Matic as attorney and the amount of the lien for which he now seeks payment is fair and reasonable in amount.

Under Section 475 of the N. Y. Judiciary Law an attorney's lien is more than mere security; it is enforceable by remedy in the nature of foreclosure and may not be extinguished by action of the parties. Here Goldstein's lien arose at the commencement of the suit in condemnation and attached to the award finally made. *Reisman* v. *Independence Realty Corp.*, 89 N. Y. S. 2d 763, affd. 277 A. D. 1020; *In re Cross Island Pkway, Nassau Co.* 14 N. Y. S. 2d 238.

However, "the relative priority of the lien of the United States for unpaid taxes is, as we said in *United States* v. *Waddill Co.* 323 U. S. 353, 356, 357; * * * always a federal question to be determined finally by the federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this Court." *United States* v. *Acri*, 348 U. S. 211, 213. Whether attorney Goldstein's lien by state tests would be held to be choate, it is clear that under federal tests it is as compared to that of the Government inchoate. It was not established, for the amount of the lien was contingent on the outcome of a trial in the state condemnation court to fix the amount of the award to be made to Pay-O-Matic for the property condemned. It was but a "caveat of a more perfect lien to come" (*United States* v. *Scovil*, 348 U. S. 218, 220), and is therefore subordinate to the federal tax lien; *United States* v. *City of New Britain*, 347 U. S. 81, 84.

Motion of the Government granted; defendant's motion denied; submit judgment accordingly but without costs against the defendant.

11/1/57.

SYLVESTER J. RYAN
U. S. D. J.

Judgment

(Record, pages 64-68)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

—o—

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

PAY-O-MATIC CORP., SAMUEL GOLDSTEIN, THE CITY OF NEW YORK, and R. L. POLK & CO., INC.,

Defendants.

—o—

The plaintiff having moved for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting the relief requested in its complaint and dismissing the cross-claim of the defendant Samuel Goldstein, and defendant Samuel Goldstein having cross-moved for summary judgment granting the defendant Samuel Goldstein & Sons the relief prayed for in the cross-claim and dismissing the plaintiff's motion for summary judgment and dismissing the complaint of the plaintiff, and said motions having come on to be heard before me on the 10th day of October, 1957, and

After hearing Paul W. Wiliams, United States Attorney for the Southern District of New York (by Nicholas Tsoucalas, Assistant United States Attorney, of Counsel) in support of the plaintiff's motion and in opposition to the cross-motion, and Samuel Goldstein, Esq. in opposition to the plaintiff's motion and for the cross-motion, and there having been no other appearances, and due deliberation having been had,

Judgment

Now, on motion of Paul W. Williams, United States Attorney for the Southern District of New York, attorney for the plaintiff, it is

ORDERED that the plaintiff's motion be granted and the defendant Samuel Goldstein's cross-motion be denied; and it is further

ORDERED, ADJUDGED AND DECREED that the United States of America have judgment against defendant Pay-O-Matic Corp. for the sum of $9,669.03, and interest from June 27, 1956 in the amount of $1,327.01, amounting in all to $10,996.04; and it is further

ORDERED, ADJUDGED AND DECREED that the United States of America has a valid lien in the amount of $9,669.03 with interest from June 27, 1956, on the award granted to defendant Pay-O-Matic Corp., and now in the hands of the Comptroller of the City of New York, and it is further

ORDERED, ADJUDGED AND DECREED that the lien of the United States for federal taxes is prior and superior to all other liens on said award, and it is further

ORDERED, ADJUDGED AND DECREED that the Comptroller of the City of New York turn over the award made to defendant Pay-O-Matic Corp., amounting to $4,569.28, to the United States of America in partial satisfaction of its lien and that the Comptroller of the City of New York disregard the attorney's liens of the defendant, Samuel Goldstein, and the lien of the defendant, City of New York for sales and business taxes which have heretofore been filed with the Comptroller of the City of New York.

Dated: New York, New York.
November 8, 1957.

SYLVESTER J. RYAN,
U. S. D. J.

Exhibit II, Annexed to Cross-Motion of Appellant for Summary Judgment

(Record, page 56)

2108—A, B, C

Law Offices
SAMUEL GOLDSTEIN
217 Broadway
New York 7, N. Y.
REctor 2-5434

Samuel Goldstein
M. Robert Goldstein

Matter of The City of New York
Re: Washington Square Southeast Slum Clearance Project
Premises: 132 Bleecker Street
Borough of Manhattan, City of New York

Dated: November 18th, 1955

File 2108-B—Bryant Lighting Corp.
File 2108-C—Afco Industries, Inc.
File 2108-A—Pay-O-Matic Corporation hereby retains Samuel Goldstein & Sons as its attorneys to represent it in the above proceeding, and agrees to pay and hereby assigns to said attorneys, for their services twenty-five (25%) per cent of any award and interest that may be made for trade fixtures contained in said property.

Said attorneys' compensation is to be paid when the award is paid by the City.

Pay-O-Matic Corporation
By (Name illegible)

Block 524
Lot 13
DP 10

Received 11/21/55
(SJRJ)

Applicable Statutes

Title 26, United States Code, Section 6321

§ 6321. *Lien for taxes.*

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 779.)

Title 26, United States Code, Section 6322

§ 6322. *Period of lien.*

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 779.)

Title 26, United States Code, Section 6323

6323. *Validity against mortgagees, pledgees, purchasers and judgment creditors.*

(a) *Invalidity of lien without notice.*

Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under State or Territorial laws.*

In the office designated by the law of the State or Territory in which the property subject to the lien is situated.

whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * * *.

SECTION 475 OF THE JUDICIARY LAW OF THE STATE OF NEW YORK

475. *Attorney's lien in action, special or other proceeding.*

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. As amended L. 1936, c. 876; L. 1938, c. 34; L. 1946, c. 105, eff. Sept. 1, 1946.